APPENDIX A

Filed: April 6, 1995

IN THE SUPREME COURT
OF THE STATE OF OREGON

(OTC 3469; SC S41438)

WILLIAM T. ATKINS,
Appellant,

and

SUSAN A. ATKINS,
Plaintiff,

v.

DEPARTMENT OF REVENUE,
State of Oregon,
Respondent.

In Banc

On appeal from the Oregon Tax Court.*

Carl N. Byers, Judge.

Argued and submitted December 8, 1994; resubmitted December 19, 1994.

GILLETTE, J.

In this direct appeal from the Oregon Tax Court, taxpayers challenge a judgment that denied their claim for tax refunds of certain state income taxes. Those taxes, paid on their federal retirement income in 1986 and 1987, were assessed in violation of the constitutional doc-

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* 12 OTR 65 (1994).

trine of integovernmental tax immunity.[1] The Tax Court held that, under ORS 305.765,[2] taxpayers are entitled to a refund of taxes assessed and paid on their federal retirement income in or after 1988, but not before that year. *Atkins v. Dept. of Rev.*, 13 OTR 65, 67-68 (1994).

Taxpayers seek a reversal of the judgment of the Tax Court. Specifically, they seek a refund, not under ORS 305.765, but rather under Oregon's omnibus tax refund statute, ORS 305.270.[3] However, this court in *Ragsdale*

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[1] During the tax years in question, Oregon impermissibly taxed the retirement income of federal retirees while it exempted state retirees from paying tax on their state retirement income. In 1989, the Supreme Court of the United States held that a similar tax scheme violated the doctrine of intergovernmental tax immunity. *See Davis v. Michigan Department of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989) (holding Michigan tax scheme unconstitutional). Oregon's tax scheme later was challenged in *Ragsdale v. Dept. of Rev.*, 312 Or 529, 823 P2d 971 (1992), in which this court held:

> "Because federal retirement benefits were subject only to a limited exemption from state tax while state retirement benefits were completely exempt, ORS 316.680(1)(c) and (d) (1987) impermissibly discriminated against employees of the federal government in violation of the constitutional doctrine of intergovernmental tax immunity."

312 Or at 542 (citation omitted).

[2] ORS 305.765 provides:

> "Whenever, in a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort holds the law of any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or the part thereof affected, has expired, and if there is no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to 305.785."

[3] ORS 305.270 provides in part:

v. Dept. of Rev., 312 Or 529, 535-37, 823 P2d 971 (1992), held that ORS 305.765 governs refunds of taxes collected under laws later adjudged invalid. Under ORS 305.765, taxpayers are entitled to a refund of taxes "collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted." *See also* ORS 305.780.[4] The "action attacking the validity" of the tax

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"(1) Except as provided in ORS 118.100, if the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed under ORS chapter * * * 316 * * * or collected pursuant to ORS 305.620, or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415."

"(2) * * * The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes imposed under ORS chapter[] * * * 316 * * *, or collected pursuant to ORS 305.620 (except where any applicable ordinance specifies another period) * * *."

ORS 314.415(1)(b) provides:

"No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions, of the return in respect to which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year. If the tax owed after offsets for all amounts owed the state is less than $5, no refund shall be made."

[4] ORS 305.780 provides:

"Nothing contained in ORS 305.770 to 305.785 authorizes the refunding of any tax collected and paid under an invali-

scheme at issue was "instituted" in 1989. *Ragsdale*, 312 Or at 539. Therefore, under *Ragsdale*, taxpayers are entitled to a refund only of taxes invalidly assessed and collected "in or after" 1988. *Ibid.* The Tax Court provided that precise remedy to taxpayers. For the reasons that follow, we affirm that decision.

FACTS

Taxpayers are husband and wife. William Atkins, a federal retiree, became an Oregon resident in 1986. Susan Atkins remained a California resident during the years relevant to this appeal. In 1987, William filed an Oregon tax return disclosing his federal retirement income received in 1986. In 1988, taxpayers filed a joint, nonresident return on their 1987 income. The 1987 return reported only one-half of William Atkins' federal retirement income on the theory that, under California's community property law, one-half of that retirement income belonged to his wife. In 1991, after the Supreme Court of the United States issued its opinion in *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989), but before this Court's ruling in *Ragsdale*, the Atkins' 1987, 1988, and 1989 tax returns were audited in Oregon and California. The Oregon Department of Revenue (the Department) noted that William Atkins' federal retirement income was not California "community property" and should have been reported in full on his Oregon tax returns. On March 24, 1991, taxpayers filed an amended 1987 Oregon tax return, which claimed that, under *Davis*, none of William's federal retirement income received in 1987 was subject to tax in Oregon. The Department audited the amended return and, in January of 1992, issued a notice of assessment of additional tax for the excluded federal retire-

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dated tax law, or invalidated part thereof, where the tax as provided in such law became due and payable in any year prior to the year in which the suit or action seeking the invalidation of the law or part thereof was instituted."

ment income. Taxpayers voluntarily paid the assessment to avoid accrual of interest and then appealed the assessment to the Department. The Department denied taxpayers' claim for refund on July 9, 1993. Taxpayers appealed to the Oregon Tax Court, which held that the taxes included on taxpayers' 1987 return (on one-half of their federal retirement income) could not be refunded. The additional taxes, paid in response to the 1992 assessment by the Department, were refunded. Taxpayers sought direct review of the Tax Court judgment in this court.

DISCUSSION

Taxpayers make two different claims for refund. Their dispute with the Department always has concerned the refund of taxes reported in their 1987 joint tax return. That was the dispute litigated below at the Department and in the Tax Court. In this court, taxpayers now claim, for what appears to be the first time, that they are entitled to a refund of taxes paid by William Atkins for *1986*. That claim is not properly before this court, and we do not address it.[5] The sole issue properly before us is whether taxpayers are entitled to a refund of taxes paid on the portion of William Atkins' federal retirement income reported as income in 1987. We now turn to that issue.

Taxpayers argue that this court's decision in *Ragsdale* fails to provide them with the full retroactive application of *Davis* required by *Harper v. Virginia Dept. of Taxation*, 509 US ——, 113 S Ct 2510, 125 L Ed 2d 74 (1993) (pertaining to a Virginia tax scheme). Taxpayers also assert that Oregon's tax refund statutes, as

[5] By our estimation, nearly eight years have passed since taxpayers filed their 1986 tax return, and never before have they asserted this claim for refund. On review of taxpayers' claims, this court is not a court of first impression. Taxpayers cannot avoid the exhaustion of their administrative remedies merely because they are before this court on another matter. *See Nutbrown v. Munn*, 311 Or 328, 811 P2d 131 (1991) (administrative remedies must be exhausted).

construed by this Court, deny them a "clear and certain remedy" that will meet federal due process requirements. *See McKesson Corp v. Florida Alcohol & Tobacco Div.*, 496 US 18, 110 S Ct 2238, 110 L Ed 2d 17 (1990) (setting out federal due process requirements in this context). Taxpayers also argue that, in *Ragsdale*, this court impermissibly construed ORS 305.765 to deny them the benefit of the three-year statute of limitations for refunds of "excess" taxes that is provided in ORS 305.270 and 314.415(1)(b). *See Reich v. Collins*, 513 US ——, 115 S Ct 547, 130 L Ed 2d 454 (1994) (holding that State of Georgia could not hold out what plainly appeared to be a clear and certain post-deprivation remedy and then declare, only after disputed taxes were paid, that no such remedy existed).

We shall discuss taxpayers' arguments in three parts. In part one, we discuss whether Oregon statutes provide a "clear and certain" remedy for taxes paid pursuant to a law later held invalid and, if so, what that remedy requires. In part two, we assess taxpayers' argument that *Davis* and *Harper* require full retroactive payment of all taxes. In part three, we focus on the due process requirements of *McKesson* and *Reich*, to determine whether ORS 305.765 and our holding in *Ragsdale* violate those requirements.

I. OREGON'S REMEDY

Oregon provides, by statute, a special form of tax refund for taxes assessed and collected pursuant to a tax law that is later invalidated. That statute has particular time limits. The impetus for that refund remedy came in 1930, when Oregon's "intangibles tax" was declared unconstitutional by this court. *See Redfield et al. v. Fisher et al.*, 135 Or 180, 204, 292 P 813 (1930), *reh den*, 135 Or 205, 295 P 461 (1931) (so holding). In 1931, the Oregon legislature enacted what is now ORS 305.765 through 305.785. In *Ragsdale*, 312 Or at 536-37, this court interpreted ORS 305.765 and held that—in the absence of a more specific statute relating to the

challenge, invalidation, and refund of taxes paid pursuant to a law later held invalid—the legislature intended ORS 305.765 to apply. The context of the statute, including related statutes enacted by the same legislature, demonstrated that legislative intent. *Ibid.*; *see PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (discussing methodology for interpretation of statutes). Because taxpayers later challenge that interpretation on federal due process grounds, see part III, *post*, we explain, once again, that interpretation here.

In 1929, just before the great stock market crash, Oregon enacted two new tax provisions. The first provision, artfully titled the "Property Tax Relief Act of 1929," established Oregon's first income tax. Or Laws 1929, ch 448. The second provision taxed "intangibles," including gross interest or dividends, other than stock dividends, derived from "bonds, notes, claims and demands, secured or unsecured * * *, all shares of stock in corporations and any and all other evidences of indebtedness." Or Laws 1929, ch 429, § 1. Both tax acts included provisions for refunds of "excess" taxes paid, Or Laws 1929, ch 448, § 21 (income tax); Or Laws 1929, ch 429, § 10 (intangibles tax), and both authorized the State Tax Commission to use limited amounts of the generated tax revenue for that purpose.

The "intangibles tax" almost immediately was challenged and was struck down in *Redfield*, in which this court held that the intangibles tax violated the Fourteenth Amendment to the Constitution of the United States. 135 Or at 204. Within a matter of weeks after this court announced its *Redfield* decision, the State Tax Commission requested two opinions from the Oregon Attorney General. The first request asked "whether refunds [could] be made by any of the present state officials either out of funds which have been receipted into the general fund or which have been held by the Treasurer unreceipted, and, if so, by whom, and, if not, what legal steps [were] required in order to authorize the making of refunds." 15

Op Att'y Gen 34 (Or 1930-32). The second request asked whether the *Redfield* decision had struck down the refund provision of the intangible tax act or whether, instead, that provision could be used to refund the taxes collected unconstitutionally. 15 Op Att'y Gen 37 (Or 1930-32).

The opinions given by the Attorney General, in response to those two questions, set the stage for the legislative action that followed. The first opinion distinguished between the refund of a tax later held invalid and the refund of an "overpayment" of a tax. In the Attorney General's view, a refund of a tax, voluntarily paid pursuant to a law later held invalid, could not be made under then-existing Oregon law without specific authorization.

> " '[T]axes voluntarily paid cannot be recovered, and, in the absence of statute, * * * the payment of illegal taxes "under protest" does not make the payment involuntary so as to authorize the taxpayer to recover the taxes so paid.' "

15 Op Att'y Gen 35 (Or 1930-32) (quoting *Johnson v. Crook County*, 53 Or 329, 334-35, 100 P 294 (1909), and cases cited therein). *See also Moffitt v. Salem*, 81 Or. 686, 691, 160 P 1152 (1916) (stating rule); 10 Op Att'y Gen 167 (Or 1920-22) (stating rule and noting cases). The Attorney General concluded that taxes collected under the "intangibles tax" before it was held invalid could not be refunded without specific legislative authorization.

The second opinion of the Attorney General advised the State Tax Commission that the limited funds provided by Oregon Laws 1929, chapter 429, section 15, for refunds of "excess" taxes paid were not available to make refunds of taxes assessed and collected under mistake of law. Instead, those funds were

> "to be used in making refunds of amounts paid by taxpayers in excess of the taxes they were legally

> required to pay. Such excess was not paid under a mistake of law, but constitute[d] money paid upon condition that the amount thereof in excess of the taxes due should be refunded as soon as ascertained. Under such circumstances neither the Tax Commission nor the State of Oregon obtained any title thereto."

15 Op Att'y Gen at 38. The Attorney General again advised that the existing refund statute, and the limited fund provided for refunds of "excess taxes paid," did not authorize the refund of taxes paid "under a mistake of law." *Id.* at 37-38. This, he advised, would require legislative authorization. That authorization soon followed.

In 1931, the legislature enacted three statutes relevant to this appeal. The first was an omnibus refund provision, which authorized the State Tax Commission to draw directly from the general fund to pay refunds of taxes "in excess of those due or legally assessable." It provided as follows:

> "Section 1. Whenever it shall appear to the state tax commission from the audit of the returns required by any revenue measure, or otherwise, that the taxes, penalty or interest paid by a taxpayer or any part thereof, are in excess of those due or legally assessable, the commission is hereby authorized to refund to any taxpayer who has paid the tax, all taxes, interest or penalties in excess of those due or legally assessable, with interest at the rate of 6 per cent per annum from and after 30 days from the date of filing claim for refund.
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> "Section 2. That in lieu of the procedure provided in certain of the revenue acts for the retaining of a working balance by the commission from which refunds may be made, the commission is hereby authorized, in accordance with the requirement of the secretary of state, to pay over all funds received

> under any of the revenue acts, to the state treasurer, and to write refund checks upon the state treasurer for refunds authorized by law."

Or Laws 1931, ch. 229. That statute forms the basis for our present omnibus refund statute, ORS 305.270.

Later, during the same legislative session, the legislature enacted two companion statutes that specifically authorized, and limited, refunds of taxes collected pursuant to the "intangibles tax" and any future tax that was held to be invalid. Oregon Laws 1931, chapter 338, dealt specifically with the "intangibles tax" refund. It appropriated an amount to be used for repayment of the tax and directed the Tax Commission to prepare a report of all taxpayers who had paid it. The statute then directed the Secretary of State to audit the State Tax Commission's report before forwarding it to the State Treasurer for payment. If and when the Supreme Court of the United States denied the state's petition for certiorari, or affirmed the judgment of this court, the Treasurer was authorized to pay the refunds. This elaborate refund scheme was repeated in Oregon Laws 1931, chapter 337, which also provided in part:

> "Whenever, in any proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the state treasury, the court of last resort shall have held said law or any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or the part thereof affected, shall have expired, and in case there be no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner herein provided."

That latter provision now is codified as ORS 305.765.[6]

Having provided the historical context of the relevant statutes, we now turn to resolution of taxpayers' arguments. Taxpayers rely on the phrase "and if there is no other statute authorizing refund thereof," in ORS 305.765, to argue that Oregon's current omnibus tax refund statute, with its longer statute of limitations, should apply. We do not agree. As this court noted in *Ragsdale*, the intent of the legislature is clear from the fact that the legislature found it necessary to enact all the above-mentioned statutes in the same legislative session. If the legislature had intended the 1931 omnibus refund statute to apply to *all* tax refunds, including refunds of taxes paid pursuant to laws later held to be invalid, it would not have enacted Oregon Laws 1931, chapter 337 or 338. A construction of the 1931 omnibus tax refund statute to make that law applicable to *all* refunds also would have contradicted the Attorney General's contemporaneous opinion that "refunds of amounts paid by taxpayers in excess of the taxes they were legally required to pay" were *not the same* as refunds of taxes paid pursuant to a law later held invalid.[7] We explained in *Ragsdale* that, if the 1931 provision for *future* refunds of taxes paid pursuant to laws later held invalid, Oregon Laws 1931, chapter 337, were to have *any* effect at the time it was enacted, the legislature could not have intended it to be overshadowed by

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[6] In the 1953 revision and recodification of Oregon's statutes, the phrase "and in case there be no other statute authorizing refund thereof" was changed to "and if there is no other statute authorizing refund thereof." *Compare* OCLA 110-859 (1931) *with* (*former*) ORS 306.280 (1953). The change in wording became law by authority of ORS 174.510 (1953) (adopting revised statutes as presented in enrolled House Bill No. 2). We find nothing in that stylistic change suggesting a change in the meaning of the phrase.

[7] We do not hold that the legislative intent of the omnibus tax refund statute passed in 1931 is dependent on the Attorney General's opinion addressing refunds. We merely note that the state's chief legal officer used the quoted phrase to refer to refunds of *excess* taxes, and not refunds of *invalidated* taxes.

the earlier enacted omnibus refund statute of that same year. It has long been the rule of this court that " 'statutes on the same subject * * * particularly if passed at the same [legislative] session, should receive a construction, if possible, which will give effect to each of them.' " *Ragsdale,* 312 Or at 537 (quoting *Daly v. Horsefly Irrigation District,* 143 Or 441, 446, 21 P2d 787 (1933)).

It is clear from the context of ORS 305.765, as illustrated above, that the phrase on which taxpayers rely originally referred to the *more specific* refund provisions in Oregon Laws 1931, chapter 338, and not the omnibus refund statute enacted as Oregon Laws 1931, chapter 229. We once again hold that, consistent with the clear intent of the legislature, the more specific provisions of ORS 305.765, rather than the more general provision of ORS 305.270, control eligibility for refunds of the kind sought by taxpayers here.

Having reaffirmed our earlier analysis in *Ragsdale,* we now turn to the requirements and limitations imposed by ORS 305.765. To receive a refund under that statute, the invalid state law first must be "attacked" in an "action" and held "invalid" by this court. Once the "time limited for any further proceeding to sustain the validity of the law * * * has expired," refunds can be made. The refund, however, is limited to "all taxes collected and paid under the law or part thereof invalidated, *in or after the year in which the action attacking the validity of the same was instituted.*" ORS 305.765 (emphasis supplied). That limitation is further asserted in ORS 305.780 ("Nothing contained in ORS 305.770 to 305.785 authorizes the refund [of invalidated taxes] due and payable in any year prior to the year in which the suit or action seeking the invalidation of the law or part thereof was instituted"). We turn now to taxpayers' argument that, the Oregon refund statutes notwithstanding, full retroactive payment of *all* invalidly collected taxes is required by *Davis* or *Harper.*

II. RETROACTIVE PAYMENT OF INVALID TAXES

In *Davis*, the Supreme Court of the United States did not discuss the retroactivity question. It merely held: "The State having conceded that a refund is appropriate in these circumstances, to the extent *appellant* has paid taxes pursuant to this invalid tax scheme, *he* is entitled to a refund." 489 US at 817, 109 S Ct at 1509, 103 L Ed 2d at 906 (citations omitted; emphasis supplied). Retroactivity was not discussed specifically until *Harper*.

In *Harper*, the Supreme Court of Virginia had refused to apply the *Davis* decision to a case pending in Virginia at the time *Davis* was decided. The Supreme Court of the United States reversed the judgment of the Supreme Court of Virginia and remanded the case for the determination of a proper remedy. The Court held that, when the Court applies a federal rule of law to the parties before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 US at ——, 113 S Ct. at 2517, 125 L Ed 2d at 86. It further held:

> "Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' [*McKesson*, 496 US] at 51-52, 110 L Ed 2d 17, 110 S Ct 2238. State law may provide relief beyond the demands of federal due process, id., at 52, n 36, 110 L Ed 2d 17, 110 S Ct 2238, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 L Ed 2d 17, 110 S Ct 2238."

509 US at ——, 113 S Ct at 2520, 125 L Ed 2d at 89.

Neither *Davis* nor *Harper* required full retroactive payment of all invalidly collected taxes. Both merely re-

quired retroactive application of the *Davis* decision to all cases *pending* in state courts at the time that *Davis* was decided—a circumstance not present here. *Harper* further required that the state's chosen remedy meet the minimum standards of federal due process that are set out in *McKesson*. We turn now to those requirements.

III. THE DUE PROCESS REQUIREMENTS OF *McKESSON* AND *REICH*

In *McKesson*, 496 US at 37-39, 110 S Ct at 2250-51, 110 L Ed 2d at 36-37, the Supreme Court of the United States described the minimum due process requirements in tax cases as follows:

> [W]hereas '[w]e have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest," ' it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.
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> "* * * To satisfy the requirements of the Due Process Clause, therefore, [in a post-deprivation refund action] the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a

> 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."

(Emphasis in original; citations and footnotes omitted).

There is no question that Oregon's statutes encourage payment of a tax before litigation of a claim for relief. *See* ORS 305.419 (tax, interest, and all penalties assessed shall be paid on or before the filing of a complaint with the regular division of the Tax Court). Taxpayers do not challenge the sufficiency of the post-deprivation process afforded to them. They claim, rather, that ORS 305.765 does not provide a "clear and certain remedy" such that "the opportunity to contest the tax is a meaningful one." *McKesson*, 496 US at 39, 110 S Ct at 2251, 110 L Ed 2d at 37.

In *McKesson*, the Supreme Court of the United States spoke directly to the State of Florida's ability to limit its refund remedy and engage in sound fiscal planning. It held:

> "A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other acocunting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices

> to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax."

496 US at 45, 110 S Ct at 2254-55, 110 L Ed 2d at 41.

Oregon, through enactment of ORS 305.765, created such "procedural protections" to ensure stable fiscal planning long ago. As we have already set out, ORS 305.765 requires an early protest before a refund of taxes collected under an invalid law is available. That requirement, in *McKesson* terms, acts as a "relatively short statute[] of limitations." 496 US at 45, 110 S Ct at 2254, 110 L Ed 2d at 41. If an action attacking the validity of the tax is not instituted within the year following its assessment (*viz.*, the year in which it is due and payable in this case), no refund may be made. Furthermore, the "action" requirement in ORS 305.765 permits the state to prepare for the possibility that refunds of taxes, collected under the challenged tax scheme, might be necessary. That is exactly what the Supreme Court of the United States contemplated when it suggested that a state "place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds." *McKesson*, 496 US at 45, 100 S Ct at 2255, 110 L Ed 2d at 41.

It follows that, contrary to taxpayers' claims, the *McKesson* court considered, and approved, limitations on refunds of taxes paid pursuant to a law later held invalid. ORS 305.765 established such limitations in 1931. Consistent with that statute, Oregon provided refunds to taxpayers taxed under the invalid tax scheme back to 1988, the tax year preceding the year in which the initial tax challenge was made. Taxpayers now seek a refund of taxes paid two years before any attack or challenge was made. That claim is barred by the limitations that Oregon has placed on such refunds.

We turn now to taxpayers' final argument on review. Taxpayers argue that the Supreme Court's decision in *Reich* requires this court to apply ORS 305.270, the general tax refund statute, rather than ORS 305.765, to their claim. We do not agree. The *Reich* case involved the State of Georgia, a state that did not make special provision for refunds of taxes paid pursuant to a law later held invalid. Instead, Georgia had only one refund statute, Ga Code Ann § 48-2-35(a) (Supp 1994), which provided in part:

> "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner."

In the *Reich* case, the Georgia Supreme Court had held, without further explanation, that the statute

> "contemplate[d] the situation where a taxing authority erroneously or illegally assesses and collects a tax under a valid law. It [did] not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid."

Reich v. Collins, 262 Ga. 625, 628-29, 422 SE2d 846, 849 (1992). Accordingly, the Georgia court denied the taxpayers all post-deprivation remedies.

The Supreme Court of the United States took a different view. It held that, although a state's remedial scheme was "generally a matter only of state law," a state could not "reconfigure its scheme, unfairly, in *midcourse*—to 'bait and switch,' as some have described it." Accordingly, it reversed the Georgia court's decision. *Reich*,

513 US at ——, 115 S Ct at 550, 130 L Ed 2d at 459 (emphasis in original).

Unlike Georgia, Oregon has not "reconfigured" its scheme or changed it in midcourse. The applicable statute has been the law of this state since 1931. Neither has this court introduced "novel" procedural requirements to "thwart review," such as those that the Supreme Court of the United States found to have been created in *Reich*. *Reich*, 513 US at ——, 115 S Ct at 551, 130 L Ed 2d at 460. To the contrary, neither the controlling statute, nor our method of statutory construction, is "novel." We do not read *Reich* to require this court to abandon its longstanding rules of statutory construction in order to provide taxpayers a refund to which they would not normally be entitled. That *would be* novel.

Taxpayers have not demonstrated any reason for this court to overrule *Ragsdale*, and we adhere to it. Under that decision, taxpayers are not entitled to a refund of taxes invalidly collected before the 1988 tax year. Thus, taxpayers' claim for refund of taxes paid in 1987 must fail.

The judgment of the Tax Court is affirmed.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

SC S41438
CA 3469

WILLIAM T. ATKINS,
Plaintiff/Appellant

SUSAN ATKINS,
Plaintiff

v.

DEPARTMENT OF REVENUE
Defendant/Respondent

ORDER DENYING RECONSIDERATION

The court has considered the Petition for Reconsideration and orders that it be denied.

DATE: May 23, 1995

/s/ Wallace P. Carson, Jr.
WALLACE P. CARSON, JR.
Chief Justice

APPENDIX C

[Filed May 4, 1994]

IN THE OREGON TAX COURT

Income Tax

No. 3469

WILLIAM T. and SUSAN A. ATKINS,
Plaintiffs,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant.

SECOND CORRECTED ORDER

This matter is before the court on cross-motions for summary judgment. There is no dispute of material fact.[1] The motions raise issues with regard to the effect of *Harper v. Virginia Dept. of Taxation,* 509 US ——, 113 S Ct 2510, 125 L Ed 2d 74, (1993), on Oregon's income tax laws.

FACTS

Plantiffs are husband and wife. In 1987 husband was a resident of Oregon and wife was a resident of California. They filed a joint nonresident 1987 Oregon income tax return. The return excluded one-half of husband's federal retirement income on the theory that, under California community property law, one-half of the in-

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[1] The facts are taken from the pleadings and memoranda filed by the parties.

come belonged to wife.[2] Plaintiffs later concluded that none of their 1987 federal retirement income should have been subjected to taxation by Oregon and filed an amended 1987 return.[3] Defendant audited the return and, in January 1992, issued a notice of assessment of additional tax for the excluded federal retirement income. Although plaintiffs paid the assessment to avoid the accrual of interest, they appealed the assessment to defendant.[4] On July 9, 1993, defendant issued its Opinion and Order No. 92-5105 denying plaintiffs a refund for 1987.

A brief review of the case law will be helpful in understanding the issues raised in this appeal.

UNCONSTITUTIONAL DISCRIMINATION

In 1989, the United States Supreme Court held that a state law imposing a tax on federal retirement income, but exempting state retirement income, violated 4 USC § 111 and the constitutional doctrine of intergovernmental immunity incorporated therein. *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989).[5] The decision leaves the state with the responsibility of resolving the discrimination. 489 US at 817-18.

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[2] Plaintiffs acknowledge in their rebuttal brief that they relied on erroneous advice of the California Franchise Tax Board and a California attorney.

[3] The amended return served as a claim for refund of all taxes attributable to plaintiffs' 1987 federal retirement income. *See* ORS 305.270(2).

[4] Defendant must have also assessed deficiencies due to excluded federal retirement income for 1988 and 1989, because plaintiffs appealed assessments for those years. Their appeal of 1988 and 1989 was rendered moot when defendant refunded the taxes for those years in accordance with *Ragsdale v. Dept. of Rev.*, 312 Or 529, 823 P2d 971 (1992).

[5] Justice Stevens, in his dissent, indicates that at least 14 other states, including Oregon, had similar tax schemes. 489 US at 822.

Based on *Davis*, Oregon taxpayers who had paid state income tax on their federal retirement income filed written claims for refunds under ORS 305.270 and ORS 314.415.[6] In *Ragsdale v. Dept. of Revenue*, 11 OTR 440 (1990), this court acknowledged that Oregon's tax scheme came within the *Davis* ruling. 11 OTR at 443. However, after applying the tests set forth in *Chevron Oil v. Huson*, 404 US 97, 92 S Ct 349, 30 L Ed 2d 296 (1971), this court concluded that *Davis* should not be applied retroactively and denied the taxpayers' claim for refunds. The taxpayer appealed that ruling to the Oregon Supreme Court. 11 OTR at 446.

OREGON'S LIMITED REMEDY UNDER RAGSDALE

In *Ragsdale v. Dept. of Rev.*, 312 Or 529, 823 P2d 971 (1992), the supreme court held that, regardless of any theory of retroactivity under federal law, ORS 305.765 to 305.785 required a "measure" of retroactivity. 312 Or at 534. ORS 305.765 provides:

> "Whenever, in a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort

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[6] The relevant portions of the refund claim statutes provides:

"[I]f the amount of the tax shown as due on a report or return * * * is less than the amount theretofore paid, or if a person files a claim for refund * * * any excess tax paid shall be refunded by the department with interest * * *.

"The claim shall be made on a form prescribed by the department, except that an amended report or return showing a refund due * * * shall constitute a claim for refund." ORS 305.270(1) and (2).

"No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed * * * in compliance with ORS 305.270, * * *." ORS 314.415(1)(b).

> holds the law or any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or the part thereof affected, has expired, *and if there is no other statute authorizing refund thereof,* all taxes collected and paid under the law or part thereof invalidated, in or after the year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to ORS 305.785." (Emphasis added.)

Separate and apart from the issue of retroactivity is the issue of remedies. The *Ragsdale* court decided that ORS 305.765 through ORS 305.785 provide the exclusive remedy for refund of taxes paid under an invalidated state law. 312 Or at 537. In reconciling the statutes, the court viewed ORS 305.270 and ORS 314.415 as general refund provisions which did not apply in the face of the specific provisions of ORS 305.765. *Id.* The court interpreted the phrase "and there is no other statute authorizing refund thereof" to mean another statute "that specifically authorizes the refunding of taxes collected pursuant to laws later invalidated." 312 Or 537. This interpretation denied Oregon taxpayers refunds for any years prior to 1988.

EFFECT OF HARPER

In *Harper v. Virginia Dept. of Taxation,* 509 US ——, 113 S Ct 2510, 125 L Ed 2d 74 (1993), the United States Supreme Court held that the ruling in *Davis* was to be applied retroactively. *Harper* involved a Virginia income tax scheme similar to Oregon's and similar to the one in *Davis.* The Virginia Supreme Court acknowledged that Virginia's income tax laws violated the doctrine of intergovernmental immunity but denied that *Davis* should be applied retroactively. In *Harper,* the United States Supreme Court reversed the Virginia Supreme Court, announcing:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 113 S Ct at 2517, 125 L Ed 2d at 86.

This pronouncement alone does not entitle plaintiffs to a refund. Although a federal ruling may be given retroactive effect, the remedies provided to taxpayers are a matter of state choice.[7] The only limitations imposed upon a state's choice of remedies is that the states must comply with federal requirements for due process.

DUE PROCESS REQUIREMENTS

The requirements of due process are set out in *McKesson v. Division of Alc. Bev.*, 496 US 18, 110 S Ct 2238, 110 L Ed 2d 17 (1990). As explained in that case, because "exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." 496 US at 36. The procedural safeguards may consist of a predeprivation hearing or clear and certain, backward-looking, postdeprivation relief. 496 US at 37.

The fundamental requirement of predeprivation due process is that the person being deprived of property must be given "the opportunity to be heard."[8] *Grannis v. Ordean*, 234 US 385, 394, 34 S Ct 779, 58 L Ed 1363 (1914).

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[7] The court in *Harper* noted:

> "[W]e reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund." *Harper* at 88.

[8] To be "heard", the person "shall have the right to support his allegations by argument however brief, and, if need be, by proof,

> "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965).

In the area of taxation the taxpayer must have "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the assessment's validity." *McKesson* 496 US at 38. Plaintiffs maintain that Oregon does not provide a constitutionally sufficient predeprivation hearing.

Under Oregon's statutory scheme, taxpayers who wish to contest an income tax assessment need not pay the tax before appealing to the Department of Revenue. If a taxpayer appeals to the Department of Revenue, the department then conducts an administrative hearing. At the hearing, the taxpayer is given an opportunity to argue, to submit proof, to be represented by counsel, and to cross-examine witnesses. This administrative adjudication is conducted by a hearings officer who makes written findings of fact and recommended conclusions. The director of the department makes the ultimate decision.[9] ORS 305.275.

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however informal." *Londoner v. Denver*, 210 US 373, 386, 28 S Ct 708, 52 L Ed 103 (1908).

"The requirement of due process is that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appeal for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed." *McGregor v. Hogan*, 263 US 234, 237, 44 S Ct 50, 68 L Ed 282 (1923) (citations omitted).

[9] Although the director is charged with the duty of administering the tax laws (ORS 305.015) and, therefore, charged with raising revenue (ORS 305.025), plaintiffs do not contend that either the director or the hearings officer is not impartial.

OREGON PROCEDURE COMPLIES WITH DUE PROCESS

Oregon's statutory scheme provides taxpayers with a predeprivation hearing consistent with the requirements of due process. Taxpayers may withhold payment and seek a determination of their liability. Although taxpayers are required to pay their income tax before appealing to the Oregon Tax Court, this is only after completion of the administrative hearing.

Even if the administrative hearing does not constitute a predeprivation hearing, Oregon statutes provide a clear and backward-looking remedy for taxpayers appealing an assessment of a tax. The appeal statutes preserve the taxpayer's right to a refund. ORS 305.419 and ORS 305.435.

TWO SEPARATE GROUNDS

Plaintiffs' claim for refund in this case requires analysis on two separate grounds. Part of the taxes which plaintiffs seek to recover were assessed after the *Davis* decision. The other part of the taxes for which plaintiffs request a refund were self-assessed when they filed their original 1987 return.

Davis declared laws like Oregon's in violation of the federal constitution. *Harper* makes it clear that the *Davis* ruling is to be given full retroactive effect. That is, once Oregon's scheme became invalid under the federal constitution, defendant may not continue to assess or collect taxes under that scheme. Consequently, *Harper* makes defendant's 1992 assessment invalid. Plaintiffs timely appealed that assessment in accordance with statutory procedures. Those procedures assure plaintiffs that, if they prevail, they are entitled to a refund of the taxes paid under the assessment. ORS 305.419. The limitations of ORS 305.780 do not apply here, because the refund is not sought in a case attacking the validity of the law. That was done in *Ragsdale*. Here, plaintiffs are con-

tending that the assessment is not valid. The court concludes that plaintiffs are entitled to a refund of all taxes and interest paid under the assessment.

The second portion of plaintiffs' claim is governed by *Ragsdale*. When the taxpayers filed their 1987 income tax return they self-assessed and paid the tax on one-half of their federal retirement. After *Davis* declared tax schemes like Oregon's invalid, plaintiffs filed a claim for refund under ORS 305.270. *Ragsdale* holds that the refund provisions of ORS 305.270 do not apply to refunds based on invalidated laws. Refunds due under invalidated laws are provided by ORS 305.765. However, plaintiffs do not qualify for a refund under ORS 305.765 because that statute provides only limited refunds. The court in *Ragsdale* held that ORS 305.765 through ORS 305.785 is the type of limited remedy which satisfies the requirements of due process. *Harper* does not change this ruling because *Harper* only addresses retroactivity, not the remedy required by due process.

The court finds plaintiffs are entitled to a refund of only those amounts paid in response to the 1992 assessment made by defendant. The self-assessed taxes paid under their original 1987 income tax return may not be refunded. Now, therefore,

IT IS HEREBY ORDERED that the Motions for Summary Judgment are granted in part and denied in part in accordance with the above decision. Plaintiffs to recover costs and disbursements.

Dated this 3rd day of May, 1994.

/s/ Carl H. Byers
Judge

APPENDIX D

[Filed June 9, 1994]

IN THE OREGON TAX COURT

Income Tax

No. 3469

WILLIAM T. ATKINS and SUSAN A. ATKINS,
Plaintiffs,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant.

JUDGMENT

Plaintiffs appealed from Department of Revenue Opinion and Order No. 92-5105, dated July 9, 1993, denying plaintiffs a refund of taxes on their 1987 federal retirement income. In accordance with this court's second corrected order of May 4, 1994;

IT IS ORDERED AND ADJUDGED as follows:

1. Defendant's assessment of additional Oregon Personal Income Tax in the total amount of $719.31 on plaintiffs' 1987 federal retirement income is void, and defendant shall refund to plaintiffs:

(a) The sum of $494.63, paid by plaintiffs on February 19, 1991;

(b) The sum of $225.64 paid, by plaintiffs on January 30, 1992;

(c) Interest on the above sums at the rate provided by ORS 305.220, from their respective payment dates until refunded.

2. Except as modified above, defendant's Opinion and Order No. 92-5150, dated July 9, 1993, is affirmed.

3. No costs are awarded.

DATED this 6th day of June 1994.

/s/ Carl H. Byers
Oregon Tax Court Judge

APPENDIX E

EXCERPTS OF RELEVANT OREGON REVISED STATUTES

305.220 Interest on deficiency, delinquency or refunds; adjustments in rates; computation. (1) unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every deficiency or delinquency arising under any law administered by the Department of Revenue shall bear simple interest at the rate of five-sixths of one percent per month or fraction thereof.

(2) Unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every refund arising under any law administered by the Department of Revenue shall:

(a) Bear interest at the rate of one percent per month, or fraction thereof, for interest periods beginning prior to June 1, 1983.

(b) Bear interest at the rate of one and one-half percent per month, or fraction thereof, for interest periods beginning on or after June 1, 1983, and prior to January 1, 1988, unless an adjustment was made under subsection (3) of this section in which case the adjusted interest rate shall be used for the period for which the adjustment was made.

(c) Subject to subsections (3) and (5) of this section and ORS 305.222, bear interest at the rate of five-sixths of one percent per month, or fraction thereof, for interest periods beginning on or after January 1, 1988.

(3)(a) If the director determines that the rates of interest for deficiencies, delinquencies and refunds established in subsections (1) and (2) of this section are at least one percentage point more or less than the prevailing rates of interest established by the Internal Revenue Service for underpayments arising under the federal tax

laws to which one percentage point has been added, the director may adopt, by rule, adjusted interest rates. The director shall not adopt adjusted interest rates more than once in a calendar year. Notice of intent to adopt adjusted interest rates shall be given in the manner provided in ORS 183.335, not less than three months before the proposed effective date of the adjusted rates.

(b) In establishing the adjusted interest rates to be adopted under this subsection:

(A) The director shall take into consideration the current interest rates established by the Internal Revenue Service for underpayments arising under the federal tax laws.

(B) To any interest amount determined by taking into consideration the current interest rates established by the Internal Revenue Service for underpayment under subparagraph (A) of this paragraph, which interest amount shall be expressed at a rate per month or fraction thereof, there shall be added one-twelfth of one percent.

(4)(a) If the director adopts an adjusted interest rate for deficiencies and delinquencies for any interest period beginning prior to June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is six percentage points below the adjusted interest rate for deficiencies and delinquencies for the same period.

(b) If the director adopts an adjusted interest rate for deficiencies and delinquencies for an interest period beginning on or after June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is equal to the adjusted interest rate for deficiencies and delinquencies.

(5) Any change in the rate of interest applicable to deficiencies, delinquencies or refunds resulting from the adoption of adjusted interest rates by the director under this section shall apply to deficiencies, delinquencies and refunds outstanding on the effective date of the rule, or

arising on or after that date, but only with respect to interest periods beginning on or after that date.

(6) If the rate of interest on a deficiency, a delinquency or a refund is governed by this section, and if a fraction of a month is involved in making the computation of interest on the deficiency, delinquency or refund, then for the fractional month, the simple interest otherwise provided shall be computed on a daily basis.

305.222 Determination of interest rate. For purposes of determining the interest rate established under ORS 305.220:

(1) In the case of a refund of tax ordered by the Oregon Tax Court or the Oregon Supreme Court and arising under any law administered by the Department of Revenue, if the refund is not paid by the department within 60 days after the date of the order, the interest rate provided under ORS 305.220 shall be one-third of percent greater than that so provided under ORS 305.220, but only with respect to interest periods that begin 60 days after that date the order is entered.

(2) In the case of a notice of assessment, or an assessment under ORS 305.265(12), pursuant to any law administered by the department, if the deficiency or delinquency is not paid within 60 days after the date of the notice of assessment or the assessment, the interest rate provided under ORS 305.220 shall be one-third of one percent greater than that so provided under ORS 305.220, but only for periods beginning after 60 days after the date of notice of assessment or assessment under ORS 305.265(12), whichever is applicable.

(3) If the deficiency or delinquency is appealed to the department or in a hardship situation to the Oregon Tax Court without prior payment of tax, then notwithstanding subsection (2) of this section; the increased rate of interest shall commence only for interest periods beginning after a 60-day period after the date that the order of the

department, the Oregon Tax Court or the Oregon Supreme Court affirming the deficiency or delinquency is entered.

305.270 Refund of excess tax paid; claim procedure. (1) Except as provided in ORS 118.100, if the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed under ORS chapter 118, 119, 308, 310, 314, 316, 317, 318 or 321, or collected pursuant to ORS 305.620, or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.

(2) The claim shall be made on a form prescribed by the department, except that an amended report or return showing a refund due and filed within the time allowed by this subsection for the filing of a claim for refund, shall constitute a claim for refund. The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes imposed under ORS chapters 310, 314, 316, 317 and 318, or collected pursuant to ORS 305.620 (except where any applicable ordinance specifies another period), within three years from the payment of the tax for taxes imposed under ORS chapter 118 or 119 and within two years of the payment of any tax under ORS chapter 308 or 321.

(3) Upon receipt of a claim for refund, or original report or return claiming a refund, the department shall either refund the amount requested or send to the claimant a notice of any proposed adjustment to the refund claim; stating the basis upon which the adjustment is made. A proposed adjustment may either increase or decrease the amount of the refund claim or result in the finding of a deficiency. If the proposed adjustment results

in a determination by the department that some amount is refundable, the department may send the claimant the adjusted amount with the notice.

(4) The claimant may, within 30 days of the date of the notice of proposed adjustment, advise the department in writing of objections to the refund adjustment and may request a conference with the department, which shall be held within one year of the date of the notice. The department shall notify the claimant of a time and place for the conference, and appoint a conference officer to meet with the claimant for an informal discussion of the claim. After the conference, the conference officer shall send to the claimant, by certified mail, a determination of the matter, and include therewith either a notice of refund denial or payment of any amount found to be refundable, together with any applicable interest provided by this section. If the conference officer determines that a deficiency exists, the officer shall include a notice of assessment with the determination.

(5) If no conference is requested, and the adjustments have not resulted in the finding of a deficiency, the following shall apply:

(a) If written objections have been made by the claimant, the department shall consider the objections, determine any issues raised and send the claimant a notice of refund denial or payment of any amount found to be refundable, together with any interest provided by this section.

(b) If no written objections are made, the notice of any proposed adjustment shall be final after the period for requesting a conference or filing written objections has expired.

(6) If no conference is requested, and the notice of proposed adjustment has asserted a deficiency, the department shall consider any objections made by the person denied the refund, make a determination of any issues

raised, pay any refunds, found due, with applicable interest, or assess any deficiency and mail a notice thereof within one year from the date of the notice of deficiency, unless an extension of time is agreed upon as described in subsection (7) of this section.

(7) If, prior to the expiration of any period of time prescribed in subsection (6) of this section for giving of notice of assessment, the department and the person consent in writing to the deficiency being assessed after the expiration of such prescribed period, such deficiency may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period agreed upon.

(8) If the department refunds the amount requested as provided in subsection (3) of this section, without examination or audit of the refund claim, the department shall give notice of this to the claimant at the time of making the refund. Thereafter, the department shall have one year in which to examine or audit the refund claim, and send the notice of proposed adjustment provided for in subsection (3) of this section, in addition to any time permitted in ORS 314.410 or 314.415.

(9) The failure to hold a requested conference within the one-year period prescribed in subsection (4) of this section shall not invalidate any assessment of deficiency made within the one-year period pursuant to subsection (8) of this section or within any extension of time made pursuant to subsection (7) of this section, but shall invalidate any assessment of interest or penalties attributable to the deficiency. After an assessment has been made, the department and the person assessed may still hold a conference in accordance with ORS 305.115(7) within 90 days from the date of assessment. If a conference is held, the 90-day period under ORS 305.280(2) shall run from the date of the conference officer's written determination of the issues.

(10) The claimant may appeal any notice of proposed adjustment, refund denial or notice of assessment in the manner provided in ORS 305.280. The failure to file written objections or to request or have a conference shall not affect the rights of appeal so provided. All notices and determinations shall set forth rights of appeal.

314.415 Refunds; interest; credits. (1)(a) If the department determines pursuant to ORS 305.270 that the amount of the tax due is less than the amount theretofore paid, the excess shall be refunded by the department with interest at the rate established under ORS 305.220, for each month or fraction of a month during a period beginning 45 days after the due date of the return or the date the tax was paid, whichever is the later, to the time the refund is made.

(b) No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions, of the return in respect of which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year. If the tax owed is less than $1, no refund shall be made.

* * * *

(e) The amount of the refund, exclusive of interest thereon, shall not exceed the portion of the tax paid during such period preceding the filing of the claim or, if no claim is filed, then during the period preceding the allowance of the refund during which a claim might have been filed. Where there has been an overpayment of any tax imposed, the amount of the overpayment and interest

thereon shall be credited against any tax, penalty or interest then due from the taxpayer, and only the balance shall be refunded.

(f) Except as provided in ORS 305.265(12), if, pursuant to a notice of deficiency or assessment, the taxpayer pays the amount specified in the notice, or any part thereof, and if, upon appeal, the department, the Oregon Tax Court or the Oregon Supreme Court orders that all or any part of the deficiency amount specified in the notice and paid by the taxpayer be refunded, the amount so ordered to be refunded shall bear interest at the rate established for refunds in ORS 305.220. Interest shall be computed from the date of payment to the department. Nothing in this paragraph shall require that interest be paid upon any amount for any period for which interest upon the same amount for the same period is required to be paid under ORS 305.419.

(2) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270 or subsection (1) of this section, if, prior to the expiration of the period prescribed in paragraph (b) of subsection (1) of this section, the department and the taxpayer consent in writing to the refund of tax after the expiration of the period prescribed, the refund shall be made at any time prior to the expiration of the period agreed upon and no refund shall be made or allowed after the expiration of the period agreed upon unless a claim for refund is filed by the taxpayer before the expiration of the period agreed upon in compliance with the manner prescribed by the department. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The department shall have the power to consent to such refund only where the taxpayer has consented to assessment of additional tax, if such be determined upon audit, after the expiration of the applicable three-year or five-year period prescribed in ORS 314.410(1) and (2).

* * * *

(5) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270, or other provisions of this section, if the taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in federal income tax for any year, the period within which a claim for credit or refund may be filed or credit or refund allowed or made if no claim is filed shall be the period provided within subsections (1) to (4) of this section or six months after the date of the expiration of the agreed period for assessing deficiency in federal income tax, whichever period expires the later.

(6) The department may make separate refunds of withheld taxes upon request by a husband or wife who has filed a joint return, the refund payable to each spouse being proportioned to the gross earnings of each shown by the information returns filed by the employer or otherwise shown to the satisfaction of the department.

(7) If a taxpayer entitled to a refund under subsection (1) of this section dies, the department may issue a draft for payment of such refund under the terms and conditions set out in ORS 293.490 to 293.500 exercising the same powers and subject to the same restrictions pursuant to which the State Treasurer is authorized to pay the amounts of warrants, checks or orders under those statutes.

305.265(5): Within 30 days from the date of the notice of deficiency, the person given notice shall pay the deficiency with interest computed to the date of payment and any penalty proposed. Or within that time the person shall advise the department in writing of objections to the deficiency, and may request a conference with the department, which shall be held prior to the expiration of the one-year period set forth in subsection (7) of this section.

305.405: As part of the judicial branch of state government, there is created a court of justice to be known

as the Oregon Tax Court. The Tax Court, in cases within its jurisdiction pursuant to ORS 305.410:

(1) Is a court of record and of general jurisdiction, not limited, special or inferior jurisdiction.

(2) Has the same powers as a circuit court.

(3) Has and may exercise all ordinary and extraordinary legal, equitable and provisional remedies available in the circuit courts, as well as such additional remedies as may be assigned to it.

305.410: [T]he tax court shall be the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state.

305.419: Except as provided in subsection (3) of this section, in any appeal from an order of the department involving a deficiency of taxes imposed or measured by net income, the tax assessed, and all penalties and interest due, shall be paid to the department on or before the filing of a complaint with the regular division of the Oregon Tax Court under ORS 305.560. The complaint shall be filed as a claim for refund.

305.990(4): Violation of ORS 305.815 is punishable, upon conviction, by a fine of not more than $1,000 or by imprisonment for not more than one year in the county jail, or both.

305.992(1): If any returns required to be filed under ORS chapter . . . 314 . . . are not filed for three consecutive years by the due date (including extensions) of the return required for the third consecutive year, there shall be a penalty for each year of 100 percent of the tax liability determined after credits and prepayments for each year.

(2): The penalty imposed under this section is in addition to any other penalty imposed by law. However, the total

amount of penalties imposed for any taxable year under this section, ORS 305.265(13) and 314.400 shall not exceed 100 percent of the tax liability.

314.400(1): If a taxpayer (a) fails to file a report or return of tax liabilty or of income at the time prescribed therefor, or (b) fails to pay a tax at the time the tax becomes due, there shall be added to the amount of tax required to be shown as tax on the report or return a delinquency penalty of five percent of the amount of such tax.

(2): If the failure to file a report or return continues for a period in excess of three months after the due date:

(a) There shall be added to the amount of tax required to be shown on the return a failure to file penalty of 20 percent of the amount of such tax; and

(b) Thereafter the department may send a notice and demand to the person to file a report or return within 30 days of the mailing of the notice. If after such notice and demand no return or report is filed within the 30 days, the department may determine the tax according to the best of its information and belief, assess the tax with appropriate penalty and interest plus an additional penalty of 25 percent of the tax deficiency determined by the department and give written notice of the determination and assessment to the person required to make the filing.

(3): A penalty equal to 100 percent of any deficiency determined by the department shall be assessed and collected if:

(a) There is a failure to file a report or return with intent to evade the tax;

(b) A report or return was falsely prepared and filed with intent to evade the tax; or

(c) A false claim was intentionally filed under ORS 310.630 to 310.690.

314.525(3): Interest shall accrue on the underpayment of estimated tax under ORS 314.505 to 314.525 at the rate established under ORS 305.220, for each month or fraction thereof during which period the estimated tax or any installment thereof remains unpaid. The penalty provisions contained in this chapter and ORS chapters 317 and 318 for underpayment of tax shall not apply to underpayments of estimated tax under ORS 314.505 to 314.525.

316.992(1): The department shall assess a penalty of $250 against any individual who files what purports to be a return of the tax imposed by this chapter but which:

(a): Does not contain information on which the substantial correctness of the self-assessment may be judged; or

(b): Contains information that on its face indicates that the self-assessment is substantially incorrect.

174.010: In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

305.765. Refund of taxes adjudged invalid.—Whenever, in a proceeding involving the validity of any law whereby taxes assessed or imposed have been collected and received by the state, acting through any department or agency thereof, and paid into the State Treasury, if the court of last resort holds the law or any part thereof invalid, and the time limited for any further proceeding to sustain the validity of the law, or in the part thereof affected, has expired, and if there is no other statute authorizing refund thereof, all taxes collected and paid under the law or part thereof invalidated, in or after the

year in which the action attacking the validity of the same was instituted, shall be refunded and repaid in the manner provided in ORS 305.770 to 305.785.

305.770. Report of taxpayers paying invalid tax; issuance and payments of warrants.—The department or agency of the state charged with the duty of administering the law so invalidated, either wholly or in part, shall prepare a detailed report, listing by name, address and amount of payment each taxpayer who paid an invalid tax under the law. The Executive Department shall issue a warrant in favor of each taxpayer listed therein, in the amount so reported, and shall forward the warrant to the taxpayer at the address shown in the report. The State Treasurer shall pay the warrants from the General Fund in the usual manner when and as presented. Warrants refunding invalid taxes shall be payable to the taxpayers named in the report required by this section or to their heirs, administrators, executors or assigns.

305.775. Interest on amount of refunds in certain cases.—If an appeal from or petition for certiorari to review a decision of the Supreme Court of Oregon, holding a tax law or any part thereof invalid, is taken to the Supreme Court of the United States and that court does not reverse or modify the decision of the Supreme Court of Oregon, the refund of the invalid taxes shall include interest on the amount paid at the rate of six percent from the date of the last decision of the Supreme Court of Oregon in the matter to the date of filing with the Secretary of State of the report and list of taxpayers entitled to the refunds as required by ORS 305.770.

305.780. Taxes due prior to year in which suit bought. —Nothing contained in ORS 305.770 to 305.785 authorizes the reunding of any tax collected and paid under an invalidated tax law, or invalidated part thereof, where the tax as provided in such law became due and payable in any year prior to the year in which the suit or action seeking the invalidation of the law or part thereof was instituted.

APPENDIX F

In re claims for and time within which same shall be made for refunds of personal income taxes paid on compensation received in the year 1938 and preceding years by employees of corporations owned and controlled by the state of Oregon.

January 24, 1940.

State Tax Commission,
State Office Building.

Gentlemen: I have for consideration your letter of December 18, 1939, concerning refunds of personal income taxes paid on compensation received in 1938 and preceding years by employees of corporations owned and controlled by the United States.

From the decision in the case of Meredith v. State Tax Commission, 29 Or. Advance Sheets, 529, it appears that such compensation was exempt from the operation of the state income tax law prior to the change in the federal law effected by the decision in Graves v. O'Keefe, 306 U. S. 466, and the Public Salary Tax Act of 1939. Under the aforementioned ruling of the United States supreme court, and congressional statute, taxes imposed on compensation received prior to January 1, 1939, for services rendered to the United States are not collectible by the states. However, even though such taxes were illegally collected under a mistake of law, they cannot be refunded except pursuant to express statutory authority. In this connection, your attention is directed to my opinion to you of November 12, 1930.

The particular statutes which relate to the authority of the tax commission to refund personal income taxes are: Chapter 229, Oregon Laws, 1931 (section 69-449, Oregon Code 1935 Supplement); subsection 6, section 5, chapter 387, Oregon Laws, 1933 (subsection 6, section 69-1521. Oregon Code 1935 Supplement); and section 14, chapter 488, Oregon Laws, 1939. (Because of its limited application chapter 337, Oregon Laws, 1931 (sec-

tion 69-748, et. seq., Oregon Code 1935 Supplement) does not seem material in this connection). If possible, these statutes must be construed so that effect will be given to each; but, if this cannot be done, the subsequent statute will be considered as qualifying or impliedly repealing the former to the extent necessary to resolve the conflict. State v. Linn county, 25 Or. 503; Benson v. Withycombe, 84 Or. 652; Winslow v. Fleischner, 112 Or. 23.

Chapter 229, Oregon Laws, 1931 (section 69-449, Oregon Code 1935 Supplement), authorizes the commission to refund all taxes and additional charges paid "in excess of those due or legally assessable, with interest at the rate of six per cent per annum from and after thirty days from the date of filing claim or refund". While that section contemplates that a claim for refund shall be filed, it does not specify a period of limitation. Such a period of limitation, however, is provided by a later enactment. Subsection 6, section 5, chapter 387, Oregon Laws, 1933, (subsection 6, section 69-1521, Oregon Code 1935 Supplement) provides that "no refund shall be allowed or made after two years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer". The different period of limitation specified in section 69-1522, Oregon Code 1935 Supplement, as amended by section 14, chapter 488, Oregon Laws, 1939, does not seem applicable to the tax years here involved because section 20 of that chapter states:

> "It is expressly intended that, except as otherwise provided, the amendments contained herein shall be applicable to all tax years beginning after December 31, 1938, and that income for tax years beginning prior to January 1, 1939, shall be taxed according to the law applicable to such years."

Upon the basis of these considerations it is my opinion that the commission has no authority to refund a tax paid

under a mistake of law unless the refund is made, or a claim therefor is filed by the taxpayer, within two years from the time the tax was paid.

Your second inquiry concerns the nature of a claim for refund. While the statute does not specify what constitutes a sufficient claim, it appears that the commission in pursuance of its statutory authority, particularly that conferred by section 69-1536, Oregon Code 1930, has provided by regulation:

> "Application for refund must be accompanied by a statement of facts upon which the application is based, and if the refund is claimed because of an error in the return, the application must be accompanied by an amended return." Oregon Tax Regulations, article 195.

While the provisions of the statute and regulations with regard to filing claims for refund must be strictly complied with, they are not designed as traps for the unwary and should be realistically construed. Tucker v. Alexander, 275 U. S. 228; Grays Harbor Motorship Corporation v. United States, 45 F. (2d) 259, 282; American Security & Trust Co. v. Tait, 5 F. Supp. 337, 345. Thus, the mere filing of a return or payment of a tax under protest is not sufficient. Mutual Trust Life Ins. Co. v. United States, 45 F. (2d) 288, 290; Semmes Motor Co. v. United States, 7 A. F. T. R. 9119, 9121. The requirements of the statute are substantially complied with if the taxpayer submits a statement or letter of protest giving notice of the particular tax for which a refund is sought, the amount of refund applied for, and the grounds upon which the claim is founded. United States v. Felt & Terrant Mfg. Co., 283 U. S. 269. Where such an informal claim is filed and accepted by the administrative officials within the statutory period of limitation, it constitutes a valid basis upon which the refund may be made even though the claim is not formally perfected until after the statutory period is lapsed. Night Hawk Leasing Co. v. United States, 18 F. Supp. 938, 942.

Based upon these authorities it is my opinion an informal claim which was filed within the statutory period and which otherwise substantially complied with the requirements of the statutes and regulations pertaining to the tax years in question, may be perfected and allowed after the statutory period has elapsed.

I. H. VAN WINKLE,
Attorney General.

APPENDIX G

EXCERPT FROM THE RESPONDENT'S BRIEF IN THE SUPREME COURT OF OREGON IN THE CASE OF NUTBROWN V. MUNN, CASE NO. SC S36652

* * * *

The Tax Injunction Act prohibits enjoining state tax administration except where the state remedy is not "plain, speedy and efficient." The principles of comity on which the *McNary* majority relied require initial resort to state remedies unless they are not "plain, adequate, and complete." *McNary, supra,* 454 US at 116. The *McNary* Court could "discern no significant difference, for purposes of the principles recognized in this case," between the two standards. *Id.* n. 8.[15] Thus, if the state provides remedies that protect federal rights adequately as a matter of federal law, federal law will defer to those remedies subject only to ultimate review for constitutionality by the Supreme Court. *See McNary, supra,* 454 US at 116.

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[15] In *Rosewell v. LaSalle National Bank, supra,* the Court's majority declined to equate "plain, speedy and efficient" as used in the Tax Injunction Act, with the equitable rule of "plain, adequate and complete." 450 US at 526-27. The Court noted as the basis for finding a difference that, under equity practice prior to the Act, interest was required before the remedy would be considered adequate. *Id.* Because the Oregon system requires DOR to pay interest on refunds, ORS 305.220, ORS 305.222, ORS 305.270 and ORS 314.415, whatever difference the two formulations may entail is irrelevant to the analysis of the adequacy of the Oregon remedy.

APPENDIX H

EXCERPT FROM RESPONDENT'S BRIEF IN OPPOSITION IN NUTBROWN V. MUNN, NO. U.S. 91-457

* * * *

Examining the language and history of the Tax Injunction Act in *Rosewell*, the Court concluded that the requirement of a "plain, speedy and efficient" remedy referred only to the *procedural adequacy* of the remedy. 450 U.S. at 512-525. A state remedy is adequate if the taxpayer had a "full hearing and judicial determination of the controversy." 450 U.S. at 514, *quoting* S. Rep. No. 701, 72d Cong., 1st Sess., 2 (1932). The Court stated:

> There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a "full hearing and judicial determination", at which she may raise any and all constitutional objections to the tax. . . . Appeal to the higher Illinois courts is authorized . . . and review is ultimately available in this Court . . . . Respondent does not allege any procedural defect in the Illinois remedy, other than delay, . . . that would preclude preservation and consideration of her federal rights, since she is free to raise her equal protection and due process federal objections during the Application for Judgment proceedings before the Circuit Court of Cook County.

450 U.S. at 514-15 (citations omitted).

The delay in coming to court, if any, caused by the exhaustion requirement does not render the administrative process inadequate. Indeed, the Illinois remedies considered in *Rosewell* were far more burdensome than those of which petitioners complain, resulting in delays of over two years at a time to obtain relief for repeated and egregious overassessment. Moreover, the Illinois system

provided no interest to the ultimately victorious taxpayer, unlike the Oregon system. *See* Or. Rev. Stat.§§ 305.220, 305.222, 305.270 and 314.415.

Petitioners focus narrowly on the administrative process, asserting that they have asked for relief not available from the agency. By contrast, in both *Rosewell* and *Grace Brethren* the Court looked not only at the administrative process, but also at the judicial avenues open to the taxpayer dissatisfied with the results obtained in that process to determine whether petitioners had the opportunity for a full hearing and judicial review of their claims. Even though the California administrative agency in *Grace Brethren* lacked authority to declare the challenged statute unconstitutional, 457 U.S. at 413 n. 30, this Court found the state remedies plain, speedy and efficient because they met minimal procedural requirements and provided a full hearing and judicial review. Despite petitioners' attempts to evade the plain meaning of the Oregon Supreme Court's opinion, the Oregon courts provide a judicial forum for consideration and review of all their claims if they remain dissatisfied after availing themselves of the administrative process.[12] The state remedies are adequate.

* * * *

[12] Even if the Court's examination were limited solely to the remedies provided by the administrative process, petitioners' argument is obviously flawed. If they were correct, any party could avoid an exhaustion requirement, whether state or federal, by simply asserting a manifestly frivolous claim for a form of relief the agency in question was not authorized to grant.